WAHBUNGA REALTY SDN BHD & ORS v. DATO' SRI ANDREW KAM TAI YEOW & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
RAVINTHRAN PARAMAGURU JCA
CHE MOHD RUZIMA GHAZALI JCA
[CIVIL APPEAL NOS: W-02(IM)(NCC)-2007-10-2017, W-02(IM)(NCC)-2008-10-2017, W-02(IM)(NCC)-2009-10-2017, W-02(IM)(NCC)-794-04-2018, W-02(IM)(NCC)-795-04-2018 & W-02(IM)(NCC)-803-04-2018]
30 DECEMBER 2022

Abstract – *(i) A company is a separate entity, distinct from its shareholders, and therefore, the property owned by the company belongs to it and not to its shareholders. The shareholders have no legal nor equitable rights in the assets of the company; (ii) The shareholders of the company only recognises the registered shareholders of the shares, not the alleged trust created by a shareholders agreement.*

CIVIL PROCEDURE: *Striking out – Action – Shareholders agreement – Triable issues – Whether arose – Whether claim unsustainable*

CONTRACT: *Agreement – Shareholders agreement – Privity of contract – Doctrine of – Whether company separate entity distinct from shareholders – Whether shareholders have legal or equitable rights in assets of company – Whether shareholders recognise trust created by shareholders agreement*

The plaintiff was the son of the first defendant. The second defendant was a private limited company and its core business was in the oil palm industry, and owned, among others, approximately 4,219 acres of plantation land in Raub Pahang. The third defendant was a wholly-owned subsidiary of the second defendant. It owned and operated a palm oil mill situated on the plantation land owned by the second defendant. The fourth to the 11th defendants held shares in the second defendant. Both the plaintiff and the first defendant were the shareholders of the second, fourth to 11th defendants. Based on the shareholding structure, the plaintiff contended that the first defendant's entire interest in the second defendant amounted to approximately 87.79% of its shares, whether directly or indirectly, through the fourth to 11th defendants. The plaintiff was appointed as a director of the second defendant in 1986. During the financial crisis in the 1980s, the plaintiff had agreed to stay on with the first, second and third defendants to rehabilitate the poor financial position of the second and the third defendants, on the understanding that the first defendant's entire interest in the second and third defendants would belong to the plaintiff and would be held by or on behalf of the first defendant for the benefit of the plaintiff until

subsequently transferred to the plaintiff (the 'underlying agreement'). The plaintiff claimed to have managed to turn the business of the second and third defendants around by 1997, therefore upholding his end of the bargain under the underlying agreement. The plaintiff did not demand for the first defendant to transfer his 100% interest in the second defendant to him, *inter alia*, due to the close relationship of father-son and there were no reasons for the plaintiff not to distrust his own father. However, around 2010, the plaintiff claimed that the first defendant had failed to honour the underlying agreement. Eventually, as a compromise and for the sake of peace in the family, the plaintiff agreed to vary the underlying agreement by entering into a shareholder's agreement ('shareholders agreement') with the first defendant. Based on the shareholders agreement, the plaintiff was now claiming 50% of the first defendant's interest in the second defendant and the right of first refusal or option to purchase the balance 50% of the first defendant's interest in the second defendant. The plaintiff took the position that the first defendant owned nearly 87.79% of the shares in the second defendant, whether directly or indirectly, through the fourth to the 11th defendants. The mechanism to determine the price of the said remaining 50% interests was stipulated in cl. 3 of the shareholders agreement where it was agreed that the price was to be determined by conducting a public tender of the assets of the second defendant. The price of the remaining 50% shares shall be half the highest tender price obtained at the public tender. From the public tender exercise, the highest tender price for the assets of the second defendant was RM140 million. However, the plaintiff claimed that the second and third defendants, under the control of the first defendant, then attempted to sell the assets of the second defendant, despite the terms of the shareholders agreement. Subsequently, the plaintiff received notices of a meeting requisitioned by the first defendant for the removal of the plaintiff as a director and to sell the assets of the second and third defendants. The above events led to the plaintiff filing the present suit seeking certain reliefs. The defendants then filed several applications to strike out the plaintiff's claim. These applications had been dismissed by the High Court Judge ('HCJ'). The HCJ also granted an interlocutory injunction, dismissed the defendants' application to set aside the interim injunction and allowed fortification of damages in the sum of RM500,000 only. Hence, the aggrieved parties filed these appeals: (i) Appeal 2007 by the fourth to 11th defendants; (ii) Appeal 2008 by the first defendant; (iii) Appeal 2009 by the second and the third defendants; (iv) Appeal 794 by the second and third defendants against the fortification of damages in respect of the interlocutory injunction for RM500,000 instead of RM20 million as prayed for; (v) Appeal 795 by the first to the 11th defendants against the HCJ dismissing the first to 11th defendants' application to set aside the *ad interim* injunction; and (vi) Appeal 803 against the HCJ's decision to allow the plaintiff's application for an interlocutory injunction until the final disposal of the action.

Held (striking out Appeal 2008 and Appeal 794; allowing other appeals) Per Azizah Nawawi JCA delivering the judgment of the court:

(1) In respect of Appeal No. 2008, in the High Court, the first defendant had applied to strike out the plaintiff's claim on the grounds, *inter alia*, that the shareholders agreement was merely a family arrangement, lacking in intention to create a legal and binding contract and that the shareholders agreement was without any consideration, and was therefore void and unenforceable under s. 26 of the Contracts Act 1950. There were indeed triable issues regarding the interpretation of the shareholders agreement, on the alleged breaches of the agreement, on the issue of whether there was a valid consideration and whether the said agreement was void and unenforceable pursuant to s. 26 of the Contracts Act 1950. As such, Appeal 2008 was dismissed with costs. (paras 21 & 22)

(2) Appeal 2007 by the second and third defendants and Appeal 2009 by the fourth to the 11th defendants were against the decision of the HCJ in dismissing their applications to strike out the writ and statement of claim. Since the second to the 11th defendants were not parties to the shareholders agreement between the plaintiff and the first defendant, they were therefore not bound by the said agreement because of the doctrine of privity of contract. The second to the 11th defendants were an entirely distinct and separate juristic entity and personality and were not parties to the shareholders agreement. The plaintiff could not rely on the shareholders agreement to enforce it on the second to the 11th defendants, on the basis that the first defendant, being a signatory to the shareholders agreement, owned the majority shares in the second defendant, directly and indirectly, through the fourth to the 11th defendants. The plaintiff had no privity whatsoever with the second to the 11th defendants with regard to the shareholders agreement, with any resulting right of direct enforcement by him against them, as they owed no contractual or other obligation to him. A company is a separate entity distinct from its shareholders and therefore the property owned by the company belonged to it and not to its shareholders. The shareholder had no legal nor equitable rights in the assets of the company. (paras 23, 27, 28 & 32)

(3) The fourth to the 11th defendants' shareholdings in the second defendant belonged to them and not to the first defendant. As such, since the first defendant had no ownership rights in those shares, he therefore had no rights to enter into an agreement dealing with the transfer of those shares. Consequently, the plaintiff could not sue the fourth to the 11th defendants for the purpose of enforcing the terms of the shareholding agreement between the plaintiff and the first defendant against them. The dispute between the plaintiff and the first defendant over the shares in the second defendant based on the shareholding agreement did not concern the other shareholders, the fourth to the 11th defendants. The shareholders of the second defendant only recognised the registered

shareholder of the shares, not the alleged trust created by the shareholders agreement. As such, the plaintiff had no claim against the second to the 11th defendants. This was therefore a proper case to strike out the statement of claim as the plaintiff's action was obviously unsustainable. Appeal 2007 and Appeal 2009 were therefore allowed, the decision of the HCJ in respect of these appeals were set aside. The plaintiff's claim against the second to the 11th defendants were hereby struck out. (paras 37 & 41)

(4) In view of this court's decision to strike out the plaintiff's claim against the second to the 11th defendants on the basis that the plaintiff's action was obviously unsustainable, this court allowed the defendants' appeals in Appeal 795 and Appeal 803, as there were no serious issues to be tried. In Appeal 795, the decision of the HCJ was set aside and the defendants' application to set aside the *ad interim* injunction was allowed. Appeal 803 was allowed and the decision of the HCJ granting the interlocutory inunction was also set aside. With regard to Appeal 794, since the injunctive orders had been set aside, the issue of fortification of damages no longer arose. Appeal 794 was struck out. (paras 45 & 46)

Case(s) referred to:

Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd [2014] 5 CLJ 533 CA ***(refd)***

Dato' Dr Hj Mohamed Haniffa Hj Abdullah & Ors v. Koperasi Doktor Malaysia Bhd And Ors & Another Appeal [2008] 3 CLJ 323 CA ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***

Mega Forest Plantation Management Sdn Bhd v. Pengarah Perhutanan Negeri Selangor & Ors [2021] 7 CLJ 561 CA ***(refd)***

North Plaza Sdn Bhd v. United Securities Sdn Bhd [2010] 1 CLJ 470 CA ***(refd)***

Re Perkins, Ex Parte Mexican Santa Barbara Mining Co [1890] 24 QBD 613 ***(refd)***

Scruttons Ltd v. Midland Silicones Ltd [1962] AC 446 ***(refd)***

Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 1 LNS 130 FC ***(refd)***

Legislation referred to:

Companies Act 1965 (repealed), s. 163
Companies Act 2016, s. 110(4)
Contracts Act 1950, s. 26
Rules of Court 2012, O. 18 r. 19

For the appellants - Gopal Sri Ram, Wong Yee Chue, Ho Hui Ying, Jean Aw Yuen Hui, Yasmeen Soh Sha-Nisse & Phoon Mei Ee; M/s YC Wong

For the respondent - Malik Imtiaz Sarwar, Mathew Thomas Philip, Mark Ho, Voon Su Huei, Ivan Aaron Francis, Khoo Suk Chyi & Ahmad Iyas Husni; M/s Thomas Philip

[Editor's note: For the High Court judgment, please see Dato' Sri Andrew Kam Tai Yeow v. Tan Sri Dato' Kam Woon Wah & Ors [2020] 9 CLJ 693 (overruled in part).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Azizah Nawawi JCA:

Introduction

[1] There are six appeals before this court. Three appeals are in relation to the striking out applications filed by the defendants that have been dismissed by the learned High Court Judge:

B

(i) Appeal No. 2007 - is an appeal by the fourth to the 11th defendants;

(ii) Appeal No. 2008 - is an appeal by the first defendant; and

C

(iii) Appeal No. 2009 - is an appeal by the second and the third defendants.

[2] The other appeals are Appeals No. 794, 795 and 803, which arise from the High Court order dated 29 March 2018:

(i) Appeal 794 is an appeal by the second and third defendants against the fortification of damages in respect of the interlocutory injunction for RM500,000 instead of RM20 million as prayed for;

D

(ii) Appeal 795 is an appeal by the first to the 11th defendants against the learned judge to dismiss the first to 11th defendants' application to set aside the *ad interim* injunction dated 6 September 2017; and

E

(iii) Appeal No. 803 is an appeal against the learned judge decision to allow the plaintiff's application for an interlocutory injunction until the final disposal of the action.

[3] Having read the appeal records and considered all the submissions by the parties, we had dismissed Appeal No. 2008 and allowed Appeal No. 2007 and Appeal No. 2009. Consequentially, we allowed Appeal No. 795 and Appeal No. 803 and struck out Appeal No. 794. For the purpose of these appeals, the parties will be referred to as they were in the High Court.

F

G

The Salient Facts

[4] The plaintiff is a son of the first defendant, Tan Sri Dato' Kam Woon Wah. The second defendant, Raub Mining & Development Company Sdn Bhd, is a private limited company and its core business is in the oil palm industry, and owns, among others, approximately 4,219 acres of plantation land in Raub, Pahang.

H

[5] The third defendant, Raub Oil Mill Sdn Bhd is a wholly-owned subsidiary of the second defendant. It owns and operates a palm oil mill situated on the plantation land owned by the second defendant.

I

[6] The fourth to the 11th defendants hold shares in the second defendant. It is also not in dispute that both the plaintiff and the first defendant are the shareholders of the second and fourth to 11th defendants. The second defendant's shares that are held by the fourth to the 11th defendants are as follows:

Shareholders	Shareholding (%) in second defendant
4th defendant	32.07
5th defendant	26.55
5th defendant (*via* 9th defendant)	26.55
6th defendant	19.84
7th defendant	7.39
8th defendant	0.24
9th defendant	0.30
10th defendant (*via* 9th defendant)	13.36
10th defendant (*via* 11th defendant)	13.36
Individuals	0.25

[7] The plaintiff also contends that the first defendant holds the majority of shares in the fourth to the 11th defendants in the following manner:

Company/Group	Shareholding (%)
4th defendant	97.80
5th defendant	82.20
5th defendant (*via* 9th defendant)	6.77
6th defendant	98.08
7th defendant	66.67
8th defendant	75.00
9th defendant	66.67
10th defendant (*via* 9th defendant)	10.00
10th defendant (*via* 11th defendant)	49.05
Individuals	58.33

[8] Based on the above shareholding structure, the plaintiff contends that the first defendant's entire interest in the second defendant amounts to approximately 87.79% of its shares, whether directly or indirectly, through the fourth to 11th defendants.

[9] The plaintiff was appointed as a director of the second defendant 1986. During the financial crisis in the 1980s, the plaintiff had agreed to stay on with the first, second and third defendants to rehabilitate the poor financial position of the second and the third defendants, on the understanding that the

first defendant's entire interest in the second and third defendants would belong to the plaintiff and would be held by or on behalf of the first defendant for the benefit of the plaintiff until subsequently transferred to the plaintiff (the "underlying agreement').

[10] The plaintiff claimed to have managed to turn the business of the second and third defendants around by 1997, therefore upholding his end of the bargain under the underlying agreement. The plaintiff did not demand for the first defendant to transfer his 100% interest in the second defendant to him, *inter alia*, due to the close relationship of father-son and there was no reason for the plaintiff not to distrust his own father.

[11] However, around 2010, the plaintiff claimed that the first defendant has failed to honour the underlying agreement. Eventually, as a compromise and for the sake of peace in the family, the plaintiff agreed to vary the underlying agreement by entering into a shareholder's agreement with the first defendant.

[12] The plaintiff and the first defendant then entered into a shareholders agreement dated 16 January 2017 (the "shareholders agreement"). The salient terms of the shareholders' agreement are as follows:

> (1) 50 per cent of the Father's entire interests in Raub Mining & Development Company Sdn Bhd ("RMDC") (Company No: 4708-A) – which includes the Father's entire interests in Raub Oil Mill Sdn Bhd ("ROM') (Company No: 26175-P), a wholly-owned subsidiary of RMDC belongs to the Son (the "Son's Portion");
>
> (2) In the event of a complete sale of the material assets of RMDC (including the palm oil estate and the palm oil mill) (the "Material Assets of RMDC"), any monies that may be owed by the Son to the Father may be deducted from the Son's Portion, but the amount of any such deduction shall be determined at a later date by the Father and the Son;
>
> (3) In the event of a complete sale of the Material Assets of RMDC, the Son is to have the first or priority option to purchase the remaining 50 per cent of the Father's entire interests in RMDC at a price equivalent to the highest tender when the assets of RMDC are put up for public auction in 2017 (the "first or priority option"). If such a sale does materialise and if the Son does wish to exercise his first or priority option, the Son shall pay 50 per cent of the purchase price of the assets sold in order to purchase the said assets in full;
>
> (4) In the event of a complete sale of the Material Assets of RMDC, RM40.0 million will be released (being RM20.0 million) from each fifty (50) per cent portion of the said assets for the Father's personal use and expenditure during his lifetime;

[13] Based on the shareholders agreement, the plaintiff is now claiming 50% of the first defendant's interest in the second defendant and the right of first refusal or option to purchase the balance 50% of the first defendant's

interest in the second defendant. The plaintiff took the position that the first defendant owns nearly 87.79% of the shares in the second defendant, whether directly or indirectly through the fourth to the 11th defendants.

[14] The mechanism to determine the price of the said remaining 50% interests was stipulated in cl. 3 of the shareholders agreement where it was agreed that the price was to be determined by conducting a public tender of the assets of the second defendant in 2017. The price of the remaining 50% shares shall be half the highest tender price obtained at the public tender.

[15] From the public tender exercise, the highest tender price for the assets of the second defendant was RM140 million.

[16] However, the plaintiff claimed that the second and third defendants, under the control of the first defendant, then attempted to sell the assets of the second defendant, despite the terms of the shareholders agreement. A letter of intent dated 18 July 2017 was executed and a board meeting was convened on 28 July 2017 to update the progress of the sale.

[17] On 7 August 2017, the plaintiff received notices of a meeting requisitioned by the first defendant for the removal of the plaintiff as a director and to sell the assets of the second and the third defendants. The meetings were scheduled to take place on 6 September 2017.

[18] The above events led to the plaintiff filing the present suit. The reliefs, *inter alia*, sought by the plaintiff in the statement of claim are:

(i) a declaration that the shareholders agreement dated 16 January 2017 between the plaintiff and the first defendant provides, *inter alia*, that 50% of the first defendant's entire interest in the second defendant, belongs to the plaintiff;

(ii) a declaration that the first defendant holds in trust for the plaintiff, 50% of the total paid up and issued shares in the second defendant in which the first defendant has an interest, pursuant to the shareholders agreement;

(iii) a declaration that the plaintiff is the beneficial owner of 50% of the total paid up and issued shares in the second defendant in which the first defendant has an interest pursuant to the shareholders agreement;

(iv) a declaration that the entire interest of the first defendant in the second defendant is held through the interests of the first defendant in the fourth to the 11th defendants as well as held personally by the first defendant in the second defendant and that therefore, the 50% of the first defendant's entire interest in the second defendant includes 50% of the interests held by the first defendant in the fourth to the 11th defendants as well as 50% of the interest held by the first defendant personally in the second defendant;

(v) a declaration that the plaintiff has the right of first refusal or option, to purchase from the first defendant the balance 50% of the first defendant's entire interest in the total paid up and issued shares in the second defendant, pursuant to the shareholders agreement;

(vi) a declaration that the option referred to in prayer (v) above extends to the right of first refusal or option to purchase from the first defendant the balance 50% of the first defendant's interest in the fourth to 11th defendants as well as 50% of the interest held by the first defendant personally in the second defendant;

(vii) a specific performance of the shareholders agreement between the plaintiff and the first defendant;

(viii) an order that the 12th and 13th defendants take all necessary steps to ensure that the transfer of shares of the second and the fourth to the 11th defendants, consequent upon prayer (vii) above is effective and regular;

(ix) the defendants, whether by themselves, their officers, representatives, servants and/or agents, where applicable, be restrained and an injunction be granted to restrain the defendants whether by themselves, their officers, representatives, servants and/or agents, where applicable, from directly or indirectly acting on, implementing, carrying out or otherwise taking any steps and/or doing anything to act on, implement and/or carry out any members' resolution passed at any meeting of shareholders of the second to the sixth and the 11th defendants with a view to the removal of the plaintiff as director of the second to the 11th defendants;

(x) a declaration that any removal of the plaintiff as a director of the second to the 11th defendants which may have been resolved and/or effected by the defendants is null and void;

(xi) an order that any removal of the plaintiff as a director of the second to the 11th defendants which may have been resolved and/or effected by the defendants and which is declared as null and void by this court be set aside and the plaintiff be reinstated as a director of the second to the 11th defendants and that consequential thereto, all records, registers and documents be rectified accordingly;

(xii) an order that the defendants take such steps as are necessary and as are required of them by law, regulation and/or by the relevant authorities to cancel, set aside or reverse any steps taken pursuant to any members' resolution passed at any meeting of shareholders of the second to sixth and 11th defendants with a view to the removal of the plaintiff as director of the second to the 11th defendants and/or with a view to the sale of the assets of the second and/or third defendants;

(xiii) the defendants, whether by themselves, their employees, agents, representatives, nominees and/or howsoever, be restrained and an injunction do hereby be issued to restrain the defendants, whether by themselves, their employees, agents, representatives, nominees and/or howsoever, from disposing, pledging, encumbering and/or dealing with in any manner whatsoever, all the shares in the second to the 11th defendants, including restraint upon the dilution of the shares thereof;

(xiv) The second defendant, whether by themselves, their directors, their officers, representatives, servants and/or agents be restrained and an injunction be granted to restrain the defendants whether by themselves, their directors, their officers, representatives, servants and/or agents, from disposing, pledging, dealing in any manner whatsoever, all or any assets of the second and/or third defendant, including all the shares in the third defendant and the following:

(a) a piece of land with an area measuring approximately 4215.5198 acres held under H.S.(D) 10803, Lot No. PT 23120 Mukim Gali, District of Raub, Pahang;

(b) a piece of land with an area measuring approximately 4.2732 acres held under H.S.(D) 10940, Lot No. PT 22468 Mukim Gah District of Raub, Pahang;

(c) the palm oil mill located at H.S.(D) 10803, Lot No. PT 23120, Bukit Koman, Mukim Gali, 27600 Raub, Pahang.

[19] The defendants then filed several applications to strike out the plaintiff's claim and these applications have been dismissed by the learned High Court Judge. The learned judge had also granted an interlocutory injunction, dismissed the defendants' application to set aside the interim injunction and allowed fortification of damages in the sum of RM500,000 only. Hence the aggrieved parties have filed these appeals before this court.

Our Findings

[20] It is trite that the court should only exercise its power to strike out a claim or defence under O. 18 r. 19 Rules of Court 2012 in cases where it is plain and obvious that the claim or defence is obviously unsustainable. Therefore, so long as the claim or defence discloses some ground of action and raises some questions fit to be tried, the claim or defence should not be struck out.

Appeal No. 2008

[21] In respect of Appeal No. 2008, in the High Court, the first defendant had applied to strike out the plaintiff's claim on the grounds, *inter alia*, that the shareholders agreement is merely a family arrangement, lacking in

intention to create a legal and binding contract and that the shareholders agreement is without any consideration, and is therefore void and unenforceable under s. 26 of the Contracts Act 1950.

[22] We are of the considered opinion and we agree with the findings of the learned judge that there are triable issues regarding the interpretation of the shareholders agreement dated 16 January 2017, on the alleged breaches of the agreement, on the issue of whether there is a valid consideration and whether the said agreement is void and unenforceable pursuant to s. 26 of the Contracts Act 1950. As such, Appeal No. 2008 is dismissed with costs.

Appeal Nos. 2007 And 2009

[23] Appeal No. 2007 is an appeal by the second and the third defendants, whilst Appeal No. 2009 is an appeal by the fourth to the 11th defendants, against the decision of the learned judge in dismissing their applications to strike out the writ and statement of claim.

[24] As against the second and third defendants, the learned judge held that the suit against them must proceed, because even though the second and third defendants are "... not parties to the shareholders agreement, their assets, which is currently held by the first defendant either directly or indirectly, is the subject matter of the shareholders' agreement."

[25] As against the fourth to the 11th defendants, the learned judge dismissed the applications to strike out on the following ground:

> [67] The Plaintiff is also seeking declaratory relief against the fourth to the 11th Defendants. It is not disputed that the fourth to the 11th Defendants are not parties to the Shareholder Agreement. However as evident from the result of the CCM searches (Enclosure 4 Exhibit "A-2") the first Defendant holds substantial shares (majority shareholder) in the fourth to the 11th Defendants which in turn holds shares in the second Defendant. The Defendant's entire interests (either directly or indirectly) in the second and third Defendants is the subject matter of the shareholders' agreement. On the face of the shareholders' agreement as pleaded in paragraph 29 of the Statement of Claim, the first Defendant has agreed that 50% of his entire interest in the second and third Defendants belongs to the Plaintiff.
>
> While the balance 50% is subject to the Plaintiff exercising the Option as stipulated in clause 4 of the shareholders' agreement. Thus on the pleaded facts there is a trust created over the balance 50% of the first Defendant's entire interest in the second and third Defendants where the Defendant is holding the said 50% interests in trust for the benefit of the Plaintiff. As such, as a trustee, the first Defendant is obliged not to act in any manner that is prejudicial or detrimental to the Plaintiff's interests.

[26] Therefore, the learned judge's decision to dismiss the second to the 11th defendants' application is predicated on the fact that the first defendant is a majority shareholder in the fourth to the 11th defendants, which in turn own the majority of shares in the second defendant. The learned judge made this finding despite acknowledging the fact that the second to the 11th defendants are not privy to the shareholders agreement.

[27] We are of the considered opinion and we agree with the defendants/appellants that since the second to the 11th defendants are not parties to the shareholders agreement between the plaintiff and the first defendant, they are therefore not bound by the said agreement because of the doctrine of privity of contract. The second to the 11th defendants are an entirely distinct and separate juristic entity and personality, and were not parties to the shareholders agreement.

[28] When the second to the 11th defendants are not parties to the shareholders agreement, the plaintiff cannot rely on the shareholders agreement to enforce it on the second to the 11th defendants, on the basis that the first defendant, being a signatory to the shareholders agreement, owns the majority shares in the second defendant, directly and indirectly, through the fourth to the 11th defendant. The plaintiff has no privity whatsoever with the second to the 11th defendants with regard to the shareholders agreement, with any resulting right of direct enforcement by him against them, as they owe no contractual or other obligation to him.

[29] In *Scruttons Ltd v. Midland Silicones Ltd* [1962] AC 446, which dealt with the English position on the doctrine of privity, Lord Reid said (at pp. 472-473):

> In considering the various arguments for the appellants, I think it is necessary to have in mind certain established principles of the English law of contract. Although I may regret it, I find it impossible to deny the existence of the *general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him*. That rule appears to have been crystallised a century ago in *Tweddle v. Atkinson* ((1861) 1 B & S 393) and finally established in this House in *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* ([1915] AC 847).
>
> (emphasis added)

[30] In *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170, the Privy Council held that the doctrine of privity applies in Malaysia. In delivering the judgment of the board, Lord Wilberforce said (at p. 174):

> It is true that section 2(d) of the Contracts (Malay States) Ordinance gives a wider definition of "consideration" than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected

A the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. **On the contrary paragraphs (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue**.
(emphasis added)

B **[31]** In *Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd* [2014] 5 CLJ 533; [2015] 1 MLJ 284, this court held as follows:

[63] The law is clear. **A person who is not a party to a contract has no right to sue on a contract** (see *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170, PC; [1967] 2 PCC 465, PC; and s. 2(d) of
C the Contracts Act 1950; *Oversea Chinese Banking Corporation Ltd v. Woo Hing Brothers (M) Sdn Bhd* [1992] 2 CLJ 1050; [1992] 2 MLJ 86, HC; and *Badiaddin Mohd Mohidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, FC). (emphasis added)

[32] Added to that, we also find that the fourth to the 11th defendants'
D shareholding in the second defendant belonged to them and not the first defendant. A company is a separate entity distinct from its shareholders and therefore the property owned by the company belongs to it and not to its shareholders. The shareholders have no legal nor equitable rights in the assets of the company.

E **[33]** In *Dato' Dr Hj Mohamed Haniffa Hj Abdullah & Ors v. Koperasi Doktor Malaysia Bhd And Ors & Another Appeal* [2008] 3 CLJ 323; [2008] 3 MLJ 530, this court held as follows at para. 9 of the judgment:

... This cardinal principle of company law was established in *Salomon v. Salomon & Co Ltd* [1897] AC 22 and exemplified in *Macaura v. Northern*
F *Assurance Co Ltd & Ors* [1925] AC 619, where Lord Buckmaster said:

> *Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up*. (emphasis added)

G **[34]** In *North Plaza Sdn Bhd v. United Securities Sdn Bhd* [2010] 1 CLJ 470; [2010] 1 MLJ 631, at para. 22, this court held as follows:

The property owned by a company belongs to it and not to its shareholders. *The shareholders have no right to any property owned by the*
H *company but are only entitled to share dividends while the company continues and a share in the distributions of the surplus in the event the company is wound up* (*Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355 following the established principle in *Macaura v. Northern Assurance Co Ltd* [1925] AC 619).
(emphasis added)

I

[35] The above principles have been reaffirmed by this court in *Mega Forest Plantation Management Sdn Bhd v. Pengarah Perhutanan Negeri Selangor & Ors* [2021] 7 CLJ 561.

> [83] *The principle that shareholders have no legal interest in the assets of the company in which shares are held, is trite*. In this regard it was established by the seminal case of *Macaura v. Northern Assurance Co Ltd* [1925] AC 619; [1925] All ER 51 HL that shareholders have no interest in a company's property. Lord Wrenbury's speech at p. 633 is instructive. He said that "the corporator even if he holds all the shares is not the corporation ... *neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation*.
>
> [84] For completeness, we think that it is also relevant to refer to *Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor And Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616 CA, where the Court of Appeal (per Zainun Ali JCA as she then was) enunciated:
>
> [146] *It is of course trite that the cornerstone of company law is that a company is a separate legal entity from its shareholders. As such, a shareholder cannot claim any right to any asset of the company, for it has no legal or equitable interest therein*. (See *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355).
>
> [85] As such, as *a matter of law, the appellant as the majority shareholder of MNSB has no legal right to the assets of MNSB*. Thus, whether the assets are in the form of the Sentang trees or other vegetation which had been planted on the sub-leased land, or whether the asset is in the form of a chose in action, the right to sue for the asset lies with MNSB. This appear to be the real intent and grievance of the appellant.
>
> (emphasis added)

[36] In view of the fundamental principle that a company is a separate entity distinct from its shareholders, and that the property owned by a company belongs to it and not its shareholders, we find that the learned judge has erred in law when she failed to give effect to the said principle.

[37] The fourth to the 11th defendants' shareholdings in the second defendant belong to them and not to the first defendant. As such, we agree with the defendants that since the first defendant has no ownership rights in those shares, he therefore has no rights to enter into an agreement dealing with the transfer of those shares. Consequently, we find that the plaintiff cannot sue the fourth to the 11th defendants for the purpose of enforcing the terms of the shareholding agreement between the plaintiff and the first defendant against them.

[38] It is also the submission of the plaintiff that the first defendant holds the shares in the second defendant, whether directly or indirectly through the fourth to the 11th defendants, in trust for him, based on the shareholders agreement. However, the plaintiff has failed to show if the memorandum of

articles of the second to 11th defendants allow the recognition of trusts. Even if the same is allowed by the articles, the same must be read with s. 110(4) of the Companies Act 2016, which reads:

> 110. Limitation of liability of trustee, *etc.*, registered as owner of shares
>
> ...
>
> (4) **Except as provided in this Act, no notice of any trust expressed, implied or constructive shall be entered on a register or branch register or be receivable by the Registrar** and no liabilities shall be affected by anything done under subsection (1), (2) or (3) or under the law of any other place which corresponds to this section and the corporation concerned shall not be affected with notice of any trust by anything so done. (emphasis added)

[39] Therefore, a company does not take cognisance of trusts in respect of its shares. It only recognises its registered shareholders. As such, we are of the considered opinion and we agree with the defendants that it is not the concern to the fourth to the 11th defendants as to whether or not the first defendant holds any of their shares registered in his name on trust for the plaintiff.

[40] The Federal Court decision in *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 1 LNS 130; [1979] 2 MLJ 240, said that while a company does not take cognisance of trusts, s. 163 of the Companies Act 1965 (now s. 110 of the Companies Act 2016) should be read with conjunction with its articles of association which doesn't comply with this provision. The Federal Court followed the principle stated in *Re Perkins, Ex Parte Mexican Santa Barbara Mining Co* [1890] 24 QBD 613 at 616 which states:

> ... **companies have nothing whatever to do with the relation between trustees and their *cestuis que* trust in respect of the shares of the company**. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register. (emphasis added)

[41] The dispute between the plaintiff and the first defendant over the shares in the second defendant based on the shareholding agreement does not concern the other shareholders, the fourth to the 11th defendants. The shareholders of the second defendant only recognised the registered shareholder of the shares, not the alleged trust created by the shareholders agreement. As such, the plaintiff has no claim against the second to the 11th defendants. This is therefore a proper case to strike out the statement of claim as the plaintiff's action is obviously unsustainable. Appeal No. 2007 and Appeal No. 2009 are therefore allowed with costs, the decision of the learned judge in respect of these appeals are set aside. The plaintiff's claim against the second to the 11th defendants are hereby struck out.

Appeal Nos. 795 And 803

[42] Appeal No. 795 is the defendants' appeal against the decision of the learned High Court judge in dismissing their application to set aside the *ad-interim* injunction, whilst Appeal No. 803 is against the decision of the learned High Court Judge to allow the interlocutory injunction.

[43] The injunctive reliefs sought by the plaintiff against the defendants are as follows:

(i) an injunction against the defendants restraining them from holding and/or convening the meeting of shareholders of the second to sixth and the 11th defendants on 6 September 2017;

(ii) an injunction against the defendants from implementing and/or carrying out any members' resolution passed at any meeting of shareholders of the second to sixth and 11th defendants;

(iii) an injunction against the defendants from taking any steps or doing anything to remove the plaintiff as a director of the second to 11th defendants;

(iv) an injunction against the defendants from disposing, pledging, dealing in any manner whatsoever, all the shares in the second defendant; and

(v) an injunction against the defendants from disposing, pledging, dealing in any manner whatsoever, all or any assets of the second defendant and/or the third defendant, in particular, all the shares in the third defendant and/or the related assets.

[44] This court in *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193, had summarised the correct approach to be adopted in hearing an application for an interlocutory injunction. In summary, the court must apply the following principles:

(i) whether there is a *bona fide* serious question to be tried;

(ii) if there is a serious issue to be tried, the court must go on to decide where the justice of the case lies; and

(iii) the judge must have in the forefront of his mind that the remedy he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper.

[45] In view of our decision above to strike out the plaintiff's claim against the second to the 11th defendants on the basis that the plaintiff's action is obviously unsustainable, we therefore allow the defendants' appeals in Appeal No. 795 and Appeal No. 803 with costs, as there are no serious issues to be tried. In Appeal No. 795, the decision of the learned judge is set aside

A and the defendants' application to set aside the *ad interim* injunction is allowed. Appeal No. 803 is allowed and the decision of the learned judge granting the interlocutory injunction is also set aside.

Appeal no. 794

B **[46]** With regard to Appeal No. 794, since the injunctive orders have been set aside, the issue of fortification of damages no longer arises. Appeal No. 794 is struck out with no order as to costs.

Conclusion

C **[47]** For the foregoing reasons, except for Appeal No. 2008 and Appeal No. 794 which was struck out, the other appeals are therefore allowed with costs.

D

E

F

G

H

I